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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

242425
U. S. Sup Ct

No. 192

HUGH NAMON RAKES, *Petitioner*

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 192

HUGH NAMON RAKES, *Petitioner*

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Hugh Namon Rakes, prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals, for the Fourth Circuit in the above entitled case.

Statement

Petitioner was indicted along with eight others at the October, 1945, Term of the United States District Court for the Eastern District of Virginia in the case of,

United States vs. William Reeves Gardner (on 20 Counts).

Hugh Namon Rakes (Counts 1, 2, 4, 5, 6, 8, 9, 10, 11, 14, 15, 16 and 18),

and eight other defendants, under Section 592 of Title 12 of the United States Code which is in part as follows:

> "Any officer • • • of any insured bank • • • who wilfully misapplies any of the moneys, funds, or credits of such • • • insured bank • • • with intent in any case to injure or defraud • • • such insured bank • • • and every person with like intent aids or abets any officer • • • in any violation of this section shall be deemed guilty of a misdemeanor."

Nine defendants were charged as aiders and abettors of defendant William Reeves Gardner, the principal, in defrauding the Farmers and Merchants State Bank, and its affiliate, the Planters Branch, of which said Gardner was Vice President, located at Fredericksburg, Virginia (hereinafter designated as "Bank"), in which said Gardner, the principal, is charged with unlawfully and feloniously misapplying the moneys, funds and credits of the Bank in issuing or causing to be issued a certain draft, designated in each of said Counts, on the Bank, drawn on the Central National Bank of Richmond, Virginia, in a certain amount payable to the Federal Reserve Bank, and that said draft was paid by said Central National Bank, which charged the account of the Bank in said Central National Bank; (R. p. 1 p. 24).

That said draft was in payment of items contained in a cash letter from said Federal Reserve Bank of Richmond, among which said items were certain designated checks signed by Petitioner, or others for him as set out in the Counts of the Indictment. In Counts 19, 20, said principal Gardner alone is charged with issuing charges against the checking account of petitioner (R. pp. 23-24).

In Counts 15 and 16 petitioner's charges are attributed to depositing in his account, in said Bank, checks from Harry Lamson, one of the original defendants, involving

the early period of October 15, 1942, in Count 16, and March 29, 1943, in Count 15 (R. pp. 19-20).

In Counts numbered 3, 7, 12, 13, 17, 19 and 20, there is no charge against petitioner, or claim that he aided and abetted the principal Gardner in issuing or causing to be issued, the said unlawful drafts drawn on the Central National Bank of Richmond (R. pp. 5-24).

Each of the said Thirteen Counts in which petitioner is charged, specifies in the items listed the checks or drafts signed by petitioner, or someone on behalf of petitioner, or endorsed by petitioner, or by one of petitioner's corporations, or charge that said principal Gardner issued a debit charge against the checking account of petitioner, in which petitioner is charged with no wrongful or illegal act (R. pp. 1-23).

Each act charged in the indictment constitutes an independent transaction, separate and apart from the transactions in other counts; all of the Twenty Counts relating to different defendants, different dates and different amounts, requiring different proof.

In the Thirteen Counts against petitioner the charge in each of the Thirteen Counts is that said checks were drawn on the Bank or deposited with the Bank, and paid by said Bank at which time Gardner, the principal, knew that petitioner, and in two Counts Lamson, did not have sufficient funds in their accounts, to pay any one of the checks, and, "• • • whereby the possession, control and use of the said sum • • • the moneys, funds, and credits of the bank *were wholly lost* to the bank • • • ." And that petitioner, along with other defendants, aided and abetted said Gardner in the above acts.

All defendants, except Gardner, were convicted in the first trial on all counts, where they were charged, with the exception of one count against defendant Proffit, upon which he, individually, was found not guilty.

Upon the first appeal a new trial was granted.

The proceedings in the new trial started on January 5, 1948, and lasted until January 30, 1948 (R. pp. 162).

William Reeves Gardner entered a plea of guilty. He was not found guilty by a Jury.

Defendants Robey and Proffit's Motions for Severance were granted and a jury trial was waived, and after this petitioner's trial, were tried and found not guilty by the same Trial Judge who presided over Petitioner's trial.

The other defendants in the trial court, except this petitioner, and his wife, entered pleas of nolo contendere, and no prison sentence was imposed on them, including Paul Karsten, Jr., Vice-President of the Bank, who was charged in Seventeen Counts.

Petitioner's wife was found not guilty by the same Jury which heard the evidence against Petitioner.

Petitioner was found guilty and received a sentence of three years, and Ten Thousand Dollars fine ($10,000.00), and was placed on probation for five years (R. pp. 160, 180). His motions to set aside the verdict, for a new trial, motion for correction and/or reduction of sentence were all denied, as well as petition of jurors in support thereof, in which they stated they received information, and not a part of the trial proceeding, which was the controlling element in their verdict, as prior to said information—. "That they very reluctantly agreed to rendering a verdict of 'Guilty' against the defendant Rakes, believing at all times that there was serious doubts as to his guilt * * *" and that—(R. p. 260). "However, the undersigned petitioners throughout the trial believed that the defendant Hugh Namon Rakes was the victim of and subject to the influence of the defendant Gardner and the officers of the various banks with which he did business, and that he did not initiate any scheme to defraud the Bank of Fredericksburg, but

aided the defendant Gardner *without full knowledge of or fully understanding the meanings of his acts or conduct.* * * *" "3. The undersigned also believe that the defendant Rakes by the loss of his property and reputation has already suffered very greatly." "Your petitioners earnestly pray the lenience of the Court on behalf of defendant Rakes and ask the Court in its sound discretion, to vacate that part of its sentence requiring the imprisonment of the defendant and in lieu thereof to put him on probation. "* * * 6. The undersigned state that this petition is signed by reason of their own wish and desire, and without inducement of any other person and solely because they believe they should make this statement for the information of the Court and in the interest of justice. * * *" (R. pp. 259, 260.)

The evidence shows that there was not any loss of any check or item named in the indictment in any Count where petitioner was charged.

The uncontradicted evidence in this case shows that the Fredericksburg Bank, Planters Branch, lost its money, if at all, by reason of its Vice President Gardner drawing drafts on said Bank's account in the Central National Bank of Richmond, Virginia and the uncontradicted evidence further shows that Petitioner Rakes had no knowledge of the issuance by said Gardner of any of said drafts or their being sent to Richmond or used to pay any items chargeable to his account at Fredericksburg (R. pp. 55, 57-59).

As shown by the indictment and the evidence and as stated by the Trial Court in its instructions to the Jury, which evidently the Jury did not understand, the Bank, through said Gardner, did not have to issue said drafts, as it could have stopped payment on any check on any account where petitioner's account was insufficient to cover any check. It should be noted, and it is undisputed in the

record, that petitioner's checks in said drafts were a small portion of the total amount covered by the drafts (R. pp. 88, 89, 90).

Petitioner did business with and had credit not only with the "Bank", but with other Banks (R. pp. 47-55), and the Jefferson Standard Life Insurance Company, which had granted him a Million Dollar loan on his properties, and had, after due investigation of his assets, and obligations due the Bank, offered in writing to grant him a second loan of $747,000 (R. p. 47) on farms and assets valued at $2,274,000 (R. pp. 40-48), but an unwarranted Federal Tax Assessment of $1,700,000, was served on Petitioner, which Petitioner settled for $1400, (R. p. 56). As stated by the Trial Court,—"I am not criticizing the Tax Department of the Federal Government about asserting a claim here of $1,700,000. • • • But that thing certainly broke up the Jefferson Standard loan and it broke defendant. • • •" (R. p. 81).

The Bank was fully secured on all it claimed petitioner owed it, and the Federal Deposit Insurance Corporation sold petitioner's collateral for $215,000, and the *F. D I. C. relinquished all claims against Petitioner and his interest.* The Bank had more than sufficient collateral for the loans it made petitioner, or for any checks which it paid for petitioner.

As stated by the President of the Bank, who was not indicted, but testified that petitioner not only gave him (the Bank) "a hundred per cent cooperation in giving me security, giving me all deeds of trust and bills of sales on everything that I asked him to do. • • •, "We secured the warranty • • • if I can recall correctly on two different pieces of property; • • • but, afterwards, we were dissatisfied with that. We didn't think we were acting right, and I think his properties were deeded back. • • •" (R. pp. 47, 48).

The Trial Court stated to the Jury that petitioners had a right to rely upon and believe that he had sufficient credit at the Bank, and that he would secure the second million dollar loan from the said Jefferson Standard Life Insurance Company.

The Court said: "And when you get to the real basis of this entire matter, had me feeling that there was really no intent on the part of Gardner or Rakes eventually to take this money away from the bank. I think they both thought that they would get to put it back, that they would get financial arrangements made so that the bank would have all of its money and there would be a substantial profit" (R. p. 80). ("I am further satisfied from the proof here that at all times the defendant had more assets in his control, I mean real assets, not inflated assets, but real assets, to more than pay every dollar he owed and to leave him several hundred dollars probably in assets" (R. p. 81).

The Record further shows that in view of the above facts that the Bank was fully covered and was receiving interest on all loans made to petitioner, and at no time was the "• • • possession, control and use" of any sum charged against petitioners, "• • • wholly lost to the Bank," as charged in the indictment.

Previous to the indictment agents of the Federal Bureau of Investigation requested appellant to deliver his personal records, namely checks, bank statements, drafts, check stubs, cancelled notes, check books and memoranda from 1941-1944 without designating any certain items; and appellant told them that his personal records were available, but that he desired to check them before they were released. Appellant asked his wife to bring said records from Floyd and Leesburg, Virginia, and to deliver them to him at Fredericksburg, Virginia. When she reached Fredericksburg with the records the F. B. I. agents asked for the papers but she refused to give them up unless and until in-

structed to do so by her husband. After arriving in her room at the hotel these men telephoned her and again asked for the papers but she refused. About one-half hour later they telephoned her again and asked her to come down to the lobby which she did, and there they again insisted that she give them the papers and she became alarmed from their voice and manner and was afraid that they would arrest her, so she went to her car, unlocked the door, and gave the papers to them. She stated that her husband was very angry with her because she gave them the papers and said she should not have given up the papers (R. pp. 76-80).

The said checks taken from petitioner's wife are the checks listed in the indictment, and other notes, checks and documents filed by respondent and offered and received in evidence over petitioner's objection. Petitioner's motion for a return of said papers and for suppression of evidence pertaining thereto was denied. Not only were these documents not suppressed, as wrongfully and unreasonably seized in violation of the Fourth Amendment, but they were *used as evidence* for indiciting, trying and convicting petitioner, in violation of the Fifth Amendment to the Constitution.

Jurisdiction

The *jurisdiction* of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347 (a)).

Opinions Below

The *Verdict* of the Jury and *Sentence* on January 30, 1938, are set out on Pages 160 and 180 of the Record.

The *Opinion* of the Circuit Court of Appeals for the Fourth Circuit, dated July 1, 1948, affirming the decision of said District Court is set out in the Record, pages 268-279.

Questions Presented

Whether the Circuit Court of Appeals erred in affirming the trial court in—

1. Convicting petitioner in violation of his Constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States, and in conflict with the applicable decisions of this Court pertaining thereto.

2. Rendering a decision on Federal questions in conflict with applicable decisions of this Court, and in conflict with decisions of other Circuit Courts of Appeals on the same matter, or has so far departed from the accepted and usual course of judicial proceedings, and in sanctioning such a departure by trial court, as to call for an exercise of this Court's power of supervision.

Reasons for Granting the Writ

The United States Circuit Court of Appeals, Fourth Circuit, erred in affirming the Judgment of the trial court (R. pp. 268-279) as follows:

1. In denying petitioner's motion to return his property, which was unreasonably seized and refusing the suppression of evidence pertaining thereto, consisting of checks, notes, mortgages and documents, which formed the sole foundation of the indictment and conviction, and which respondent illegally took from petitioner's wife in violation of petitioner's rights granted him by the Fourth Amendment to the Constitution of the United States, and in conflict with the recent decision of this Court in *Jack Turpiano, etc.* v. *United States of America*, decided June 14, 1948, *No. 428*, October Term, 1947, and many other decisions of this Court including *Johnson* v. *U. S.*, 92 L. Ed. No. 8 Adv. Add., p. 323; *Davis* v. *U. S.*, 328 U. S. 582, 593; *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 387, 64 L. Ed. 319; *McNabb* v. *U. S.*, 318

U. S. 322, 87 L. Ed. 819, 823; *Gould* v. *U. S.*, 225 U. S. 298, 65 L. Ed. 647, permitting, over petitioner's objection, the use of said papers and documents in evidence, which was tantamount to requiring petitioner to testify against himself, in violation of the Fifth Amendment of the Constitution, and is in conflict with the above decisions.

2. In refusing petitioner's motions for a new trial, and the correction or reformation of the verdict based upon two petitions filed by members of the jury after their verdict and the sentence, in which *eleven of the jurors,* stated that—

> (1) they did not believe that petitioner intended to commit a crime under the statute involved herein, and
>
> (2) That they received information during their deliberation, *not a part of the trial,* which changed their decision from not guilty to guilty. (R. pp. 259-262.)

The denial of petitioner's motions created a conflict between the said Circuit Court of Appeals, Fourth Circuit, in its decision herein, and the decisions of other Circuit Courts of Appeals, including *Young* v. *United States,* 168 F. 2d 242, decided May 11, 1948, in the Tenth Circuit, and *Southern Pacific Co.* v. *Klinge,* 65 Fed. 2d 85, 88, Tenth Circuit.

3. In admitting the great mass of documents set out in point 1, above, and in the Court's instructions to the jury pertaining thereto that, "during the course of this trial, evidence has been offered of certain action or transaction on the part of the defendant that perhaps would make him guilty of some other crime, but you have no right to convict him of the other crime • • •" is in conflict with the applicable decisions of this Court in *Boyd* v. *U. S.*, 142 U. S. 450, 35 L. Ed. 1077, and the decisions of other Circuit Courts of Appeals in *Harris* v. *U. S.*, 104 F. 2d 41, Eighth Circuit; *U. S.* v. *Modern Reed & Rattan Co.*, 159 F. 2d 656, Second Circuit.

4. The appellate court in affirming the trial court's denial of Petitioner's motion to quash the indictment before and at the close of the trial because of duplicity of charges and misjoinder of defendants is in conflict with the decision of this Court in *McElroy* v. *U. S.*, 164 U. S. 355, and other Circuit Courts of Appeals in *U. S.* v. *Dietrich, et al.*, 126 F. 664, Eighth Circuit, and *Culjak* v. *U. S.*, 53 F. 2d 554, Ninth Circuit.

5. The appellate court in affirming the trial court's denial for a change of venue as a matter of right and an abuse of discretion contrary to Rule 21, Federal Rules of Procedure.

6. The appellate court in affirming the trial court's rejection of petitioner's Prayers is in conflict with the decision of this court in *Burton* v. *U. S.*, 196 U. S. 296, and the Circuit Courts of Appeals in *Dernfield* v. *Fourteenth Street Savings Bank*, 37 App. D. C. 11; *Robertson* v. *U. S.*, 42 App. D. C. 192, and *U. S.* v. *Hillegas*, 183 F. 199, Third Circuit.

For the reasons stated above, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 192

HUGH NAMON RAKES,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF WRIT

The *Opinions* in the Courts below have not been officially reported, but are set out on pages 180, 268 of the record, and

The *Statement of the Case,* and *Questions Presented* are set out in the foregoing Petition for a Writ of Certiorari, and are adopted and made a part hereof by reference.

The *Jurisdiction, Errors* and *Reasons for Granting Writ of Certiorari* are set out in the said Petition, and are adopted and made a part hereof by reference. The Errors and Reasons for Granting the Writ are also set out in the Points below.

Argument

The United States Circuit Court of Appeals, Fourth Circuit, erred in affirming the Judgment of the Trial Court, (R. p. 268) as follows:

I

In denying petitioner's Motion to return his property, and the suppression of the same as evidence against him, said evidence consisting of paid checks, notes, mortgages,

and documents and said property being unreasonably seized and used against petitioner, which was in violation of both the Fourth and Fifth Amendments of the Constitution (R. pp. 80, 202; R. pp. 29, 30). Defendant's Exhibits 1-NZ-1, 1-OA-1, 1-OJ-1, 1-OB-1, 1-OR-1, 1-OP-1, 1-ON-1, 1-OQ-1, 1-B-1, 1-E-1, 1-H-1, 1-K-1, 1-L-1; 2-C-1; 4-C-1, 5-A-1, 5-D-1, 6-A-1, 6-F-1; 8-B-1, 8-A-1; 9-C-1, 9-D-1, 10-A-1, 10-C-1; 11-A-1, 11-B-1, 14-E-1, 14-F-1, 14-B-1, 14-I-1; HL-1, NS-109; 16-A-1, 16-D-1, 18-A-1, EX.DEN. 8; 32-NS, NS-45; 1-OS-1, 1-NZ-1.

Said documents so taken from Mrs. Rakes and offered in evidence against petitioner, numbered about a thousand (~~R. p.~~ — —), and consisted of most of the documents petitioner had accumulated over the years, in his dairy business (R. pp. 74-76).

The record shows that previous to the indictment, petitioner was approached by an agent of the Federal Bureau of Investigation, who informed him that his said records from 1941-1944 were being sought by the United States for the purpose of investigation; that petitioner informed said agent that all his personal records were available, but that he would desire to examine and check them personally before they were released; that in February, 1945, petitioner called his wife, and directed her to bring said records to him at Fredericksburg, Virginia; that his wife did bring his records to Fredericksburg, but before he arrived there his said personal records were relinquished by her to said agents of the F.B.I., without any receipt and accounting having been made of the said records; that petitioner had no intention or inclination to turn over his private and personal records without having made a thorough check of them; that he had no opportunity of making such a check, and that he received no receipt for the records, although afterwards said agents promised same

and that said records would be returned to him within a few days, which they failed to do, but retained and used same in the prosecution of him in the trial court. (Petitioner's affidavit filed December 17, 1947, made a part of the evidence by stipulation.) R. p. 196.

Mrs. Rakes testified that when she arived at Fredericksburg, Virginia, with her husband's private papers, the F.B.I. agents asked for them, but she refused to give them up until instructed to do so by her husband, who she told the agents would be there soon; that said agents telephoned her on several other occasions and again insisted that Mr. Rakes had promised to give them his papers; that she was asked by said agents to come down in the lobby of her hotel, which she did; that,

> "They finally told me that I might as well give them over to them because they could get them anyway. After the tone of voice and manner in which they spoke to me, I became afraid that they would get a warrant or the police or something and I did not know what to do * * * so I unlocked the car and gave them to them. These men knew that the papers were in the car. When my husband came he was very angry because I had given these men the papers." (Affidavit of Lillian C. Rakes filed December 17, 1947, and made a part of the evidence by stipulation.) R. p. 196.

Mr. Sauer testified for the Government that he got a number of records from Mrs. Rakes, about a thousand; that Mr. Rakes expressed his willingness to cooperate on the investigation and to furnish all of his personal records pertaining thereto, without descriptions or specifications; that when he telephoned for Mr. Rakes, Mrs. Rakes answered the telephone and he told her that Mr. Rakes had promised them the records, whereupon Mrs. Rakes delivered the papers to him; that there were about a thousand papers delivered to him by Mrs. Rakes. (R. pp. 74, 75.)

The Appellate Court's finding that, "nobody denies appellant's preliminary arrangement with the agent, or the delivery of the papers by appellant's wife in apparent compliance with that wholly voluntary arrangement. We find no legal point to decide since there was in fact no search, no seizure, and no compulsion," is not supported by the evidence. While it is true that petitioner agreed to cooperate with said agent, he never agreed, and there is no evidence to the contrary, to turn over all his personal papers without examining them and certainly never authorized his wife to do so.

If petitioner did promise to turn over the said papers to Sauer, which he denies, then he should have obtained them from petitioner, and not from his wife. Sauer claims that the papers were voluntarily surrendered by Mrs. Rakes, which she denies. The fact remains that most of the exhibits offered in evidence by respondent were obtained from petitioner's wife and were his records and, as stated, were the sole basis for the indictment.

This is equivalent to compelling petitioner to be a witness against himself in violation of the Fifth Amendment.

In *U. S.* v. *Cole,* 6 R. F. D. 581, the Court held—

> "The Government defends the legality of the seizure on the ground that the documents and money were voluntarily surrendered * * *, appears plain from the evidence that the permission given by defendants to take the money and documents was, at best, a *grudging acquiescence and not a consent freely and voluntarily given* * * *." (Italics ours.)
>
> "The motion to suppress and to return evidence is granted. * * *."

Surely, this described the instant case.

28 R. C. L. p. 531 Sec. 120, citing *Wilkerson v. State*, 9 Va. 79, 17 S. E. 990 states—

> "If the communication is acquired through privacy with either spouse it does not in view of the majority lose its privilege. Neither spouse against the objection of the other could introduce the communication in evidence directly; and what cannot be done directly cannot be accomplished through indiscretion * * *."

In *Gould* v. *U. S.*, 225 U. S. 298, 65 L. Ed. 647, the Court held—

> "* * * whether entrance to the house or office of a person suspected of a crime be obtained by a representative of any branch or subdivision of the government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, and search and seizure subsequently and secretly made in his absence falls within the scope of the prohibition of the 4th Amendment * * *."

See also *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 387, 64 L. Ed. 319; *McNabb* v. *U. S.*, 318 U. S. 332, 87 L. Ed. 819, 823.

The case of *Davis* v. *U. S.*, 328 U. S. 582, 593, 594, clearly distinguishes the difference between the right to inspect and seize *public* documents, and *private papers*, as follows:

> "Where the officers seek to inspect *public* documents at the place of business where they are required to be kept, permissible limits of persuasion are not so narrow as where *private* papers are sought. The demand is one of right. When the custodian is persuaded by argument that it is his duty to surrender them and he hands them over, duress and coercion will not be so readily implied as where private papers are involved. The custodian in his situation is not protected against the production of incriminating document. (Italics ours.)

Even assuming that Mrs. Rakes had been requested generally by her husband to deliver certain designated papers to respondent's agents, or a search warrant had been issued for certain designated papers, it would still be illegal for said agents to take *all of petitioner's private records*, and to introduce them in evidence against him as was the case here, even if the said agents talked her into delivering them.

In *Marron* v. *U. S.*, 275 U. S. 192, 196, the Court held—

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another."

In the recent decision of *Turpiano* v. *U. S.*, No. 427, October Term, 1947, there was a valid arrest and certain contraband articles were seized. The Court held that the Government should have obtained a search warrant; that,

> "The effective operation of government, however, could hardly be embarrassed by the requirement that arresting officers who have three months within which to secure the authorization of judicial authority for making search and seizure should secure such authority and not be left to their own discretion as to what is to be searched and what is to be seized."

In the present case the government also had ample time to secure a search warrant but chose to insist on petitioner's wife surrendering her husband's private and personal papers in her automobile, and she was afraid, if she did not comply,

> "That they would get a warrant or the police or something, and I did not know what to do." (Affidavit of Lillian C. Rakes, *supra.*)

Under the above circumstances and authorities, petitioner's motion for return to him of his property and sup-

pression of evidence pertaining thereto should have been granted.

The Fourth Amendment of the Constitution in part is as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated • • •."

The Fifth Amendment of the Constitution in part is as follows:

> "• • • nor shall (any person) be compelled in any Criminal Case to be a witness against himself • • •."

II

2. *The Court erred in refusing petitioner's motion for a new trial, and that the verdict be corrected or reformed, based upon two petitions filed by the jurors after their verdict.*

(a) The petitions filed by the jurors show beyond any doubt that two serious errors were committed by the jury. There was at all times a serious doubt in seven of the jurors' minds of petitioner's guilt, as said seven jurors first stood 7 to 5, for acquittal, but after six hours of deliberation, and after they received information,—not a part of the trial proceedings—that defendants Proffit, charged in Counts 14 and 15, and Robey, charged in counts 6 and 12 (petitioner was also included in Counts 6, 14 and 15) had entered pleas of Nolo Contendere (when in fact they were "not guilty" and were subsequently acquitted by the Court), they rendered a verdict of guilty against petitioner.

The two serious errors, as shown by the petitions of the jurors are,—

In Paragraph 2 of the Jurors' petition, page — they state that they believed throughout the trial,—

> "• • • That the defendant Hugh Rakes was the victim of and subject to the influence of the defendant

> Gardner and the officers of the various banks with which he did business and that he did not initiate any scheme to defraud the Bank of Fredericksburg, but aided the defendant Gardner *without full knowledge of or fully understanding the meaning of his acts or conduct,".* (Italics ours.) (R. p. 259.)

The above statement by the jurors shows that they did not understand the Instructions of the Court, and were confused.

The Court instructed the jury that,—

> "The Jury is also instructed that the defendants, in order to be guilty of aiding and abetting, must not only have had guilty knowledge of the Acts of the defendant William Reeves Gardner, but must actually have encouraged or aided such action." (R. p. 84)
>
> "But, if upon consideration of all the evidence you have a reasonable doubt as to whether the intent was to defraud the bank, then it would be your duty to reconcile that in favor of the defendant and give him the benefit of it." (R. p. 24).
>
> "If the evidence fails to convince you of the intent on the part of an aider and abetter to defraud the bank, then an aider and abetter would not be guilty. (R. p. 89).

From the above quoted statement of the Jurors and Court, it is evident that petitioner not only had no intent to defraud the bank, as he was as quoted above,—

> *"Without full knowledge of or fully understanding the meaning of his acts or deeds.* (Italics ours).

and, —

> "Was the victim of and subject to the influence of the defendant Gardner and the officers of the various banks with which he did business * * *" (R. p. 259).

As the Jurors misunderstood the meaning of the Court's instruction as to intent, and, therefore, rendered a verdict contrary to law, the verdict should be set aside. (*Coffin* v.

U. S., 162 U. S. 664, 679; *Robertson* v. *U. S.*, 42 App. D. C. 192; *U. S.* v. *Hillegas*, 183 Fed. 199; *U. S.* v. *French*, 57 Fed. 382; *Kettenbalk* v. *U. S.*, 202 Fed. 377; *Laws* v. *U. S.* 66 Fed. 2d. 870.

(b) The Court also erred, after receiving the Petitions filed by the Jurors, in failing and refusing to order a new trial, as it was then known that the Jurors,—

> "believed from information they had, that the defendants, Joseph E. Proffit and C. L. Robey, had entered pleas of Nolo Contendere" (R. p. 260).

which was erroneous, as said defendants were not guilty, and were later tried and acquitted by the Court. The said information the Jurors received was not a part of the trial proceedings, was unknown to the Court and consideration of such information was contrary to the Court's general instructions which evidently the Jurors overlooked or misunderstood, but was sufficiently important and serious to compel the Court to order a new trial. A motion for a new trial was denied on June 4, 1948.

In *Southern Pacific* v. *Klinge*, 65 F. 2d. 85, 88, outside matter, as here, was injected into the jury room where one juror said to the others that he had been told that the defendant had offered $20,000 in settlement of the case. The trial court denied the motion for a new trial. The Appellate Court in reversing the trial court held,—

> "Such outside matters as were here injected into the Jury Room poison the foundation of justice at its source.
>
> "The judgment is therefore reversed and remanded with directions to grant a new trial."

It is sincerely urged, as in the above case, the Trial Court should have explored the above charges made herein, and in the petitions of the jurors, as

> "The testimony of the juror is competent in determining the existence of the fact." (Id).

See also *Young* v. *U. S.* 168 Fed. 2d 242, 246, 247.

The evidence supports the statement in the petitions of the eleven jurors that there was serious doubt in their minds whether petitioner intended to defraud the Bank. The fact that petitioner at all times gave the Bank all the security it asked for (R. p. 259), and as stated by the Court, — "• • • *the defendant had more assets in his control, I mean real assets, not inflated assets, but real assets, to more than pay every dollar he owed and to leave him several hundred thousand dollars probably in excess,*" (R. p. 82), *and did "and was ready at all times to lengths to protect the bank* • • •." (*U. S.* v. *Matot* 146 F. 2d 197, 198, Second Circuit), shows that Petitioner did not intend to defraud the Bank.

III

The Court erred in admitting, over petitioner's objections and Motion to Suppress the great mass of documents or papers, bank checks, bank deposits and ledger sheets of the bank, bank statements, mortgages, notes, some of which were alleged to be forged, which were not named in the indictment. (R. pp. 38, 39.)

In its instructions to the Jury pertaining thereto, the Court said:

> "• • • During the course of this trial, evidence had been offered of certain *action or transactions on the part of the defendant that perhaps would make him guilty of some other crime,* but you have no right to convict him of the other crimes. • • •" (R. p. 91). (Italics ours).

The "other crimes" referred to above consisted of the forgery of some of the various notes and papers introduced in evidence over petitioner's objections, which the government claimed petitioner forged (R. pp. 140, 55), which petitioner denied he forged, or had any knowledge pertaining thereto. (R. pp. 57-64). These alleged forged documents were not named in the indictment, and their introduction in evidence, and the evidence pertaining thereto, were prejudicial to petitioner, and although the Court instructed the jury,

> "But you have no right to convict him of the other crimes,"

and added,

> "Your consideration must be confined to the charge set out in the bill of indictment," (R. p. 91).

the Court committed serious error, as shown in *Boyd* v. *U. S.* 142 U. S. 450, 35 L. Ed. 1077, in which case the Court stated:

> "Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have

adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.

"The judgment is reversed, and the cause remanded, with directions to grant a new trial." (p. 1080.)

See also *U. S.* v. *Modern Reed & Rattan,* 159 F. 2d 656, 2d Circuit, and *Harris* v. *U. S.,* 104 F. 2d 41.

Granting that the trial court's motive in making the above statement was in absolute good faith, and without intention to prejudice petitioner before the jury, nevertheless it must be stated with frankness that the Court, by the language used, really charged, in effect, to the jury that he had allowed other evidence as to transactions of the petitioner, which made him guilty of "other crimes." It would not have been possible for the Court to have said anything more hurtful to petitioner.

IV

The appellate court erred in affirming the trial court's denial of petitioner's motion to quash the indictment at the start and end of the trial.

Various defendants in this cause were indicted together, although the charges against them were several and separate and we believe this to be a fundamental error and that the Court committed error in not quashing the indictment because of these duplicitous charges, and the misjoinder shown on the face of the indictment. Some of the defendants were involved in thirteen counts; there being seven counts in which this petitioner was not involved.

To present a picture of the trial to the Court, we desire to submit the following statement and then discuss the Law:

Throughout the trial, the Government produced hundreds of exhibits relating to this petitioner and hundreds relating

to the other defendants. The evidence poured into the jury box in a constant stream, involving the failure of the bank at Fredericksburg, Virginia, for several hundred thousand dollars. The evidence was so intermingled and confused, and so technical and involved against this petitioner that we submit to this court, that when the evidence was all in, it was utterly impossible for the Jurors to so differentiate and so separate the evidence relating to this petitioner as to render a verdict with a clear understanding and discriminating knowledge of what evidence applied to each defendant as shown by the transcript of proceeding covering over 1700 pages.

The denial of petitioner's Motion to Quash the Indictment is in conflict with *McElroy* v. *U. S.*, 164 U. S. 355; *United States* v. *Dietrich, et al.*, 126 F. 644, 671, and *Culjak* v. *U. S.*, 53 F. 2d 554.

V.

The Appellate Court erred in affirming the trial Court's denial of petitioner's Motion for Change of Venue.

As appears from petitioner's Motion as to change of venue, and from his points and authorities and the joint affidavit of petitioner and his wife Lillian Conner Rakes (R. pp. 93-97) and according to the testimony of the jurors themselves, when examined on *voir dire*, there can be no serious question that the Court should have transferred this cause to another District from the Eastern District of Virginia, Richmond Division.

The joint Affidavit of petitioner and his wife, (R. p. *id.*) summarizes accurately and conservatively the evidence elicited by the examinations of the jurors when they were being qualified for service.

Under *Rule 21 of Rules of Federal Procedure* petitioner was entitled to a transfer of this case to another District, where, in the language of the rule, a transfer is required if:

> "so great a prejudice existed against the defendant that he cannot obtain a fair and impartial trial in that District or Division."

Failure to order a change of venue was, it is respectfully submitted, an abuse of discretion by the Trial Court.

VI.

The Appellate Court erred in affirming the trial court's rejection of petitioner's Prayers Numbers 11, 13 and 14. (R. p. ~~9~~ 82-84)

With apologies to the Court for the length of this Petition, but with the earnest purpose of presenting to this Court as forcibly and convincingly as possible the material errors which may have been committed by the Trial Court and the United States Circuit Court of Appeals for the Fourth Circuit, we ask for a brief discussion of one further point, which we believe justifies the granting of the Writ of Certiorari.

The case against petitioner was based chiefly upon the charges that he and his representatives issued, deposited, uttered and took credit for, in his various bank accounts, a large number of checks, including those listed in the indictment, which were not good (that is, that his accounts in the various banks did not have to his credit sufficient moneys to meet them on the dates they were issued), and that the Planters Branch of the Farmers and Merchants State Bank, Fredericksburg, Virginia, through the misconduct of its vice-president, Mr. Gardner, *"wholly lost"* its funds by reason of the irregular and illegal payment of these checks.

In view of the above charge it became vitally important in the trial before the jury that the law be declared as to the right of a depositor of a check in a bank, to draw against the same, and Prayers Nos. 11, 13 and 14 (R. pp. 82-84) were submitted to the Trial Court and refused.

Plaintiff's Prayer No. 14 (R. p. 84) which the Trial Court rejected, is particularly important in view of the testimony of respondent's witness, John W. Manchester, which shows that each check or item named in each of the thirteen counts in which petitioner was charged, was paid when it reached the bank on which it was drawn, either out of funds in petitioner's account, or was taken up by another check or cash, and that the sum of each of said checks or items was not *"wholly lost"* to the bank as charged in the indictment. (R. pp. 29-38).

An examination of these prayers will show this Court that they correctly state the law as decided by this Court in *Burton v. U. S.*, 196 U. S. 296, and by other Federal cases, to wit: *Dirnfield v. Fourteenth St. Sv. Bk.*, 37 App. D. C. 11, Citing *Harder v. George H. Price Co.*, 67 U. S. D. C. Apps. 27, 28, *Robertson v. U. S.* 42 App. D. C., 192; *U. S. v. Hillegas*, 188 Fed. 199.

We respectfully request therefore that the Court carefully examine the prayers which were refused by the Trial Court and which were affirmed by the U. S. Circuit Court of Appeals, Fourth Circuit, and give full consideration to our contention with respect to the error alleged in passing on this Petition.

Conclusion

In view of the above considerations, involving the liberty of petitioner, his good name, and all that is dear to a citizen, it is earnestly prayed that the Writ of Certiorari be granted

by this Court in order that the merits of this Petition and the points raised therein may be carefully and finally determined.

Respectfully submitted.

ROBERT H. MCNEILL,
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JAMES B. MORGAN.

(7716)

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 192

HUGH NAMON RAKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 268-279) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 2, 1948 (R. 279). The petition for a writ of certiorari was filed August 2, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended

by the Act of February 13, 1925 (now 28 U. S. C. 1254). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a motion to suppress the use as evidence of documents alleged to have been taken from petitioner illegally was properly denied.

2. Whether a motion for a new trial was properly denied.

3. Whether petitioner was prejudiced by the trial judge's instruction to the jury that they should not be influenced in reaching a verdict by the fact that the evidence might have tended to show that petitioner committed other offenses than those charged.

4. Whether a motion to quash the indictment because of an alleged misjoinder of offenses and defendants was properly denied.

5. Whether a motion for change of venue was properly denied.

STATEMENT

A 20-count indictment (R. 1-24) filed in the District Court for the Eastern District of Virginia charged one William Gardner, First Vice President of the Farmers and Merchants State Bank of Fredericksburg, Virginia, with wilful misapplication of funds of the Bank, in violation of 12 U. S. C. 592. Each count referred to a separate misapplication. Petitioner was charged

as an aider and abettor in thirteen of the transactions involved (counts 1-2, 4-6, 8-11, 14-16, and 18). Eight other persons, including petitioner's wife, were also charged as aiders and abettors, some in some counts and some in others. Severances were ordered, and petitioner and his wife, the latter being charged as an aider and abettor in ten of the counts, were tried together by a jury. She was acquitted, and he was convicted on all thirteen counts (R. 160). He was sentenced on each of three of the counts (1, 2, and 5) to three years' imprisonment, the terms to run concurrently, and on the other ten counts he was sentenced generally to five years' imprisonment. Execution of the five-year sentence was suspended and he was placed on probation for five years as to it. In addition, he was fined $5,000 on each of counts 1 and 5. (R. 180.) On appeal, the judgment of conviction was affirmed (R. 279).

Since petitioner does not question the sufficiency of the evidence supporting his conviction, it is unnecessary to review it here. The evidence is summarized, however, in the opinion of the circuit court of appeals (R. 269-271).

ARGUMENT

1. Petitioner contends that the trial court erred in denying a motion to suppress the use as evidence of certain documents relating to his financial affairs which had allegedly been taken from him illegally (Pet. 9-10, 13-19). The contention, how-

ever, is based on the assumption that the court was required to believe the testimony of his wife in support of the motion (R. 76-80), but since this testimony was sharply in conflict with the Government's evidence in all material respects (R. 73-74, 250-255), the denial of the motion was clearly justified.

Petitioner's wife's version of the circumstances under which the Government came into possession of the documents in question was as follows: Pursuant to petitioner's instructions to bring his bank statements, checks, notes, etc. from Floyd, Virginia, to Fredericksburg to give to him, she put them in a box and drove with them to Fredericksburg. There, two F.B.I. agents, Sauer and another, approached her on the street and asked her if she had petitioner's "records, cancelled checks, and things," explaining that petitioner "was having those things * * * assembled for us. He has promised to give them to us and we would like to have them." (R. 76-77.) She refused, according to her testimony, saying that petitioner "asked me to bring them to him at the [Wakefield] hotel," where he was to meet her that afternoon (R. 77-78). She then went to her room at the Wakefield. She had no sooner entered the room than "the phone rang, and it was Mr. Sauer, and he said, 'I hope you have reconsidered about giving us those papers and documents. It is imperative that we have them. * * *.'" She again refused, saying she "would rather not give them

to you until Mr. Rakes comes and sees them, and he will give them to you." (R. 78.) During the next 30 or 40 minutes, she testified, Sauer called her "three or four or five times" with the same request, and she gave the same answer (R. 78-79). On one of the calls, she said, Sauer "reminded" her that the Government "had ways to get whatever records or documents * * * they should need." Finally, she testified, she yielded to the agents' persistent demands, went downstairs to her car, which was parked "on the upper side of the service station at the Wakefield Hotel," unlocked the car and gave the agents the box of documents. Petitioner, she added, was later "very much annoyed" at her disobedience in not waiting for his arrival before surrendering his papers. (R. 79.)

Agent Sauer, however, gave a very different account of the circumstances surrounding his obtaining of petitioner's papers. He testified that when he first met petitioner, following a long investigation of his transactions, petitioner "expressed a willingness to cooperate on the investigation, and he said he would furnish all of his personal records that might be required * * *. That was on the 13th of June, 1944. He stated he would have to assemble those records, because a part of them were up at the Mill Garden farm near Fredericksburg and other records were in Floyd, and some possibly at other farms." "Between that time and June 28, 1944," Sauer con-

tinued, "I had a number of telephone contacts with Mr. Rakes in regard to the records, and he promised to bring them to Fredericksburg on June 28, 1944." (R. 250.) "That evening," Sauer further testified, "I contacted his hotel, where he regularly stopped, the Wakefield Hotel at Fredericksburg and Mrs. Rakes responded and said she had the records, but Mr. Rakes was not there, and I told her that he had promised us the records, and if it was possible I would like to go up and get the records that evening, and she said she had the records in her car and there would be no occasion for me to drive up there. It is about a mile from the Princess Anne Hotel up to the Wakefield, and she said she would bring them down, and I proposed—I had never met Mrs. Rakes—I proposed that I would stand immediately in front of the Princess Anne so that I could be identified, and would receive the records there. Special Agent Percy Smith and I waited for Mrs. Rakes, and she brought a number of boxes, which were delivered to us at the curb" (R. 250-251). On cross-examination, Sauer specifically contradicted petitioner's wife's testimony that he had had more than one telephone conversation with her (R. 252, 253, 254), that the papers were delivered to him at the Wakefield Hotel (R. 252), that she had urged him to "wait until her husband got there so that he could examine" the papers before surrendering them (R. 253), and that he, Sauer, had told her that if she did not

deliver the papers, he "had a way to get them" (R. 253). Sauer also testified that some of petitioner's bank statements were "missing" from the papers delivered by his wife, and that petitioner subsequently brought the missing statements to the agents (R. 255).

It is manifest that if Sauer's version of the circumstances under which petitioner's financial papers came into his possession was the true one, as the district court obviously believed, "there was in fact," as the circuit court of appeals observed (R. 274), "no search, no seizure and no compulsion," and hence no basis for the motion to suppress.[1]

2. Some time after verdict and judgment, three of the jurors submitted a "petition" to the trial judge asking that petitioner's prison sentence be vacated and that he be put on probation (R. 259-260). In it they expressed the opinion that petitioner "was the victim of and subject to the influence of the defendant Gardner * * *, and that he did not initiate any scheme to defraud the Bank

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[1] It may be noted that Mrs. Rakes' testimony was not only in sharp conflict with that of Sauer, but was also inconsistent with that of Akers, another defense witness. Akers testified that he saw two men approach Mrs. Rakes' car while it was parked near the Wakefield Hotel and take "a package, box or something" from it; he said that the men removed the box from the car themselves and that Mrs. Rakes was not with them (R. 198-200, 202). Under the circumstances, the trial court was obviously justified in disbelieving Mrs. Rakes' version of the manner of delivery of the papers in question, and accepting Sauer's account as the true one.

at Fredericksburg, but aided the defendant Gardner without full knowledge of or fully understanding the meaning of his acts or conduct." They also stated that "had they known in advance of their verdict that the defendants Robey and Proffit,[2] who were indicted with the defendant Rakes, were not legally guilty of the charges against them and would be so found by the Court, such fact would have had strong influence upon the verdict of the signers of this petition and their consideration of the case against the defendant Rakes."

In a similar petition (R. 260-261), seven different jurors stated that "they very reluctantly agreed to rendering a verdict of 'Guilty' against the defendant Rakes, believing at all times that there was serious doubt as to his guilt, but they finally yielded upon arguments of their co-jurors." They further stated that if they "had known that the defendants * * * Proffit and * * * Robey * * * would be found 'Not Guilty' by the Court, they would never have consented to a verdict of guilty against the defendant Rakes," and that when they returned their verdict they "verily believed from information they had that * * * Proffit and * * * Robey had entered Pleas of Nolo Contendere. They did not know that they

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[2] These two codefendants of petitioner, also named as aiders and abettors of Gardner in certain counts, obtained a severance, waived trial by jury, and were acquitted by the court some time, apparently, following petitioner's trial.

had secured a separate trial and that the Court would later return a verdict or judgment that they were not guilty."

On the basis of the above petitions, neither of which was sworn to, petitioner filed a motion for a new trial (R. 262-264), which was denied (R. 266-267).[3] Petitioner contends that this was error (Pet. 10, 19-22). The contention, we submit, is without merit.

In the first place, it is well established that "ordinarily jurors in the United States Courts will not be heard to give testimony, either oral or by affidavit, for the purpose of impeaching the verdict returned where the facts sought to be shown are such that they essentially inhere in the

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[3] In his order denying a new trial, the judge said that he was "not impressed with the statement of the jurors to the effect that they did not know that Robey and Proffit secured a separate trial. They were instructed by the court during the progress of the trial to disregard what happened to the other defendants for the reason that the only ones on trial were Hugh N. Rakes and his wife and they should consider the evidence only as it related to each of these two defendants. * * * The jury had no opportunity to hear the evidence of the defense so far as it related to Proffit and Robey and were not in a position to pass on their guilt or innocence, and if the jury permitted such considerations to enter into its deliberations the jury disregarded the plain and repeated instructions of the court throughout the length of the trial" (R. 267). The judge also remarked that "This is the second time the defendant has been found guilty of the charges by a jury of twelve men. The verdict in the first trial was set aside on account of an improper approach having been made to one of the jurors during that trial * * *" (R. 266). "Lastly," the judge said, "there is no doubt in my mind of the defendant's guilt * * * and I am further convinced that the ends of justice do not warrant the court in granting a new trial" (R. 267).

verdict." *Young* v. *United States*, 163 F. 2d 187, 188 (C.C.A. 10), certiorari denied, 332 U. S. 770.[4]

Secondly, as pointed out by the circuit court of appeals (R. 276), "if these jurors had done what they are represented as saying they would have done (that is, voted this appellant not guilty merely because other defendants in other cases

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[4] See also the numerous authorities cited in the *Young* opinion, including *Clark* v. *United States*, 289 U. S. 1, 18, *McDonald* v. *Pless*, 238 U. S. 264, and *Hyde* v. *United States*, 225 U. S. 347, 381-384. The *Young* opinion distinguished *Southern Pac. Co.* v. *Klinge*, 65 F. 2d 85 (C.C.A. 10), certiorari denied, 290 U. S. 657, relied on by petitioner (Pet. 21-22), pointing out that in that case "part of the misconduct [consisting of one juror's having an outside contact, obtaining from that source confirmation of certain information respecting the case, and relaying the confirmation to other jurors] took place outside the jury room, separate and apart from the deliberations of the jury" (163 F. 2d at 189), a factor entirely absent here.

Mattox v. *United States*, 146 U. S. 140, cited in the *Young* opinion as an exception to the general rule based on considerations of sound public policy (163 F. 2d at 188), involved an extreme situation in a capital case. There, a newspaper article containing such grossly prejudicial statements as "If [Mattox] is not found guilty of murder he will be a lucky man, for the evidence against him was very strong * * *," "* * * it was expected that [the jury's] deliberations would not last an hour * * *," "* * * friends of Mattox gave up all hope of any result but conviction," "[Mattox] has been tried for his life once before," etc. (146 U. S. at 143-144), had been introduced into the jury room and read to the jury during their deliberations. Also, the bailiff in charge of the jury had told them, "This is the third fellow he has killed" (146 U. S. at 142). This Court held that the trial court erred in refusing to admit affidavits of jurors attesting to the above incidents in support of a motion for a new trial, observing that the "public policy which forbids the reception of the affidavits, depositions or sworn statements of jurors to impeach their verdicts, may in the interest of justice create an exception to its own rule, while, at the same time, the necessity of great caution in the use of such evidence is enforced" (146 U. S. at 148).

were found not guilty) they would have been guilty of gross violation of their duty. They were sworn to reach a verdict upon the evidence before them as to this appellant in this case. * * * Jurors cannot be heard to say that if they had had certain information they would have violated their obligations as jurors. The remainder of the petitions * * * is merely a recitation that the jurors did not understand or would have ignored the clear instructions of the court [*i.e.*, on reasonable doubt]."

Finally, as has so often been pointed out, the granting or denial of a new trial rests in the sound discretion of the trial judge. Here, the judge did not refuse to consider the statements made in the jurors' petitions and thus arbitrarily decline to exercise discretion (as in the *Mattox* and *Klinge* cases, referred to in fn. 4, *supra*, p. 10). On the contrary, he gave due consideration to the statements, but in his discretion decided that "the ends of justice do not warrant the court in granting a new trial" (R. 267; see fn. 3, *supra*, p. 9).

3. Among the exhibits in evidence were certain instruments which the Government contended, and offered evidence to prove, had been forged by petitioner in the course of the fraudulent check-kiting activities carried on by him and the principal defendant Gardner (see R. 138-140). In his charge to the jury, after reviewing the evidence relating to these alleged forgeries, the trial judge

gave the unsolicited precautionary instruction that though there had been evidence of "transactions on the part of the defendant that perhaps would make him guilty of some other crime," the jury had "no right to convict him of the other crimes. Your consideration must be confined to the charge set out in the bill of indictment" (R. 141). Counsel for petitioner made no objection to this instruction. Notwithstanding the failure to object, it is now contended that the judge's reference to possible "other crimes" of petitioner was prejudicial (Pet. 10, 22-24).

The contention is plainly insubstantial. As pointed out by the circuit court of appeals (R. 275), "the admonition was not only proper but was required." The jury had heard all the evidence relating to the alleged forgeries, and obviously, therefore, the judge's admonition could not have had the effect of giving them information about something they would not otherwise have known anything about. The instruction was manifestly designed to protect petitioner from the very danger he now complains it might have been instrumental in causing, *viz.*, a finding of guilt based in part on his commission of extraneous crimes. And the failure of petitioner's counsel to object to the giving of the instruction is persuasive proof that he considered it helpful to petitioner at the time.

4. Petitioner contends that the trial court erred in refusing to quash the indictment because of an

alleged misjoinder of offenses and of defendants (Pet. 11, 24-25). There is no merit in the contention.

With respect to the alleged misjoinder of offenses, it is to be noted that Rule 8(a) of the Federal Rules of Criminal Procedure, which substantially restates previously existing law (see Advisory Committee's note), provides that two or more offenses may be charged in the same indictment in separate counts if the offenses "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." And, as pointed out by the court below (R. 273), "The several offenses charged in this indictment were not only similar but were based on transactions constituting parts of a common plan, clear upon the face of the indictment; all the counts relate to the appellant's elaborate check-kiting scheme."

With respect to the alleged misjoinder of defendants, the severance, by virtue of which petitioner stood trial with his wife as his only co-defendant, is a sufficient answer to the claim of prejudice in this respect. Moreover, as stated in the opinion below (R. 273), "These other persons * * * were alleged to have taken part in the same check-kiting scheme (and mostly in connection with the same checks) in which appellant was alleged to have been engaged. They were

officers of the various banks and signers in various capacities on the checks or notes which made up the operation. If a person knowingly aids and abets, in conjunction with various others, in some of a series of related transactions, he can hardly be heard to complain if he is charged in company with his fellow participants. The ends of justice are not served in such a case by a multiplicity of separate indictments for each participant and each transaction." See also Rule 8 (b), F. R. Crim. P., providing that "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

5. Petitioner's contention that the trial judge abused his discretion in denying his and his wife's joint motion for a change of venue (Pet. 11, 25-26) is also without merit. In the first place, the motion was not made until after the *voir dire* examination of prospective jurors and the actual empanelling of the jury which sat on the case (cf. Rule 22, F. R. Crim. P.) (R. 93-94). Furthermore, while the affidavit in support of the motion charged that more than half of the "approximately 100 veniremen" who had been examined on *voir dire* had expressed "deep convictions and strong opinions

against the innocence of these defendants," it alleged in respect of the jurors who actually sat on the case merely that some of them "may have an undercurrent" of bias against them (R. 94-95). Such a speculative allegation was clearly insufficient to require granting of the tardy request for a change of venue. The court below, we submit, adequately answered petitioner's contention when it said (R. 278), "No charge is made respecting the individuals who composed the jury. This trial was in Richmond. It would take strong evidence that in so large a city an impartial jury could not be found to try an offense committed in Fredericksburg, a smaller city some fifty miles away. Change of venue lies largely in the discretion of the trial court. That this discretion was not abused in the present case is shown not alone by the satisfaction of the judge upon the *voir dire* examination, but also by the fact that this jury acquitted appellant's co-defendant upon all counts." We would add only that the jurors' petitions to the trial judge to show greater leniency to petitioner than he had shown, discussed in another connection at pp. 7-11, *supra*, negative any suggestion of bias against petitioner.[5]

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[5] Petitioner also complains of the trial judge's refusal to charge that he could not be convicted unless it was shown that the bank whose funds were allegedly misapplied "wholly lost" such funds (Pet. 26-27). But no such proof was required. *Mulloney* v. *United States*, 79 F. 2d 566, 581 (C.C.A. 1), certiorari denied, 296 U. S. 658; *Hoss* v. *United States*, 232 Fed. 328, 334 (C.C.A. 8). Moreover, as pointed out by the court below (R. 272), the indictment did not allege total loss to

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court and should, therefore, it is respectfully submitted, be denied.

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the bank of its funds, as petitioner implies (Pet. 26), but merely that "the possession, control and use" of the funds were "wholly lost" to it (R. 3, 4, 5, etc.), and "The proof amply supported that charge" (R. 272). And any suggestion intended by petitioner (see Pet. 27) that the bank was not injured as a consequence of the elaborate check-kiting activities of petitioner and Gardner (see R. 269-271) is answered by the fact that the bank ultimately failed when their scheme of operation collapsed (R. 271).

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